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In The
SUPREME COURT of the UNITED STATES
October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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This brief in support of petitioners is submitted in accordance with Rule 37 of the Rules of this Court. Pursuant to Rule 37.3, the National Electrical Contractors Association, Inc. ("NECA") has obtained and has filed herewith the written consent of the petitioners and the respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

NECA is a construction trade association composed of approximately 4,000 electrical contractors served through 119 chapters in the United States chartered by and affiliated with the National Association. The primary purpose of these chapters is to act as multiemployer bargaining agents for the negotiation and administration of collective bargaining agreements on behalf of electrical contractors who authorize the local chapters to act as their collective bargaining agent with local unions. In all, NECA chapters represent approximately 17,000 contractors in collective bargaining, all of whom help support apprenticeship training since, typically, these local collective bargaining agreements contain provisions authorizing joint apprenticeship and training committees. Those committees, in turn, establish and set rules and policies governing the operation of apprenticeship programs in compliance with standards set by the National Joint Apprenticeship and Training Committee for the Electrical Industry ("NJATC"). NECA and the International Brotherhood of Electrical Workers jointly sponsor the NJATC which provides guidance, educational assistance and standardized curriculums to local joint apprenticeship programs in a wide variety of related program activities. Local apprenticeship programs authorized under these collective bargaining agreements currently enroll approximately 23,000 apprentices. Consequently, NECA has a vital stake in proper regulation of apprenticeship programs.

Petitioners seek to reverse the decision of the Ninth Circuit Court of Appeals holding that Section 1777.5 of the California Labor Code is preempted by the Employee Retirement Income Security Act ("ERISA"). The specific effect of that decision is to preempt enforcement of a law that allows a lower wage for registered apprentices on state public works projects

only in a particular circumstance, i.e., as participants in apprenticeship programs approved by a state agency enforcing minimum standards as part of the cooperative state-Federal effort under the National Apprenticeship Act, 29 U.S.C. § 50 (also referred to as the "Fitzgerald Act"). The impact of the decision is much broader. Without a requirement allowing a lower apprenticeship wage to be paid only when the apprentice is participating in an approved apprenticeship program, there is little incentive for contractors to utilize approved apprenticeship training programs. Instead, contractors will be free to utilize apprentices from programs that are not subject to standards or are subject to minimal standards since ERISA itself does not regulate the content and substance of apprenticeship programs. The growth and proliferation of these unapproved programs spell the decline of quality apprenticeship training since these unapproved programs will ultimately provide apprentices with inadequate supervision and substandard educational opportunities.

At issue is whether states are allowed to maintain regulation of apprenticeship plans as part of a coordinated state-Federal relationship under the Fitzgerald Act, and whether they are able to encourage contractor utilization of such regulated plans through favorable prevailing wage laws on state projects. NECA and its member contractors are committed to trade apprenticeship that is more than simply a device to pay beginning workers lower wages. Instead, apprenticeship must include quality training and education as anticipated by the Fitzgerald Act and carried out through a Federal and state partnership. One of the primary motivations for the adoption of Federal and state prevailing wage laws along with the Fitzgerald Act was the recognition that quality training is necessary for the health of the construction industry and to encourage legitimate

apprenticeship programs on public works projects to meet that end. It is NECA's contention that the Fitzgerald Act is a vital and important Federal law and should remain such. To mistakenly hold that state laws enacted as part of the Fitzgerald Act apprenticeship scheme are preempted by ERISA vitiates the Act as well as the quality of apprenticeship training throughout the country.

SUMMARY OF ARGUMENT

Among the purposes of the Fitzgerald Act expressly set forth in its text is to promote apprenticeship standards and to foster cooperation with state agencies engaged in formulating such standards. To this end, regulations promulgated by the Department of Labor set forth standards for apprenticeship programs on Federal projects as well as standards for the approval of such programs by state apprenticeship agencies as part of the joint effort authorized under the Fitzgerald Act. Approved programs must conform to certain standards with regard to the degree of supervision and the education and training provided apprentices. State prevailing wage laws permit the payment of lower wages to apprentices working on state public works projects if the apprentices participate in state-approved programs. If they do not participate in state-approved programs, the lower apprenticeship wage may not be used. Consequently, the incentive of being able to pay lower wages to apprentices encourages contractors to utilize apprentices from approved programs thereby maintaining the minimum standards for apprenticeship welfare and training adopted and furthered by approved programs.

The preemption clause of ERISA is far-reaching in scope. However, this preemption clause is not without certain conditions. ERISA contains a "savings clause" which prevents the impairment and restriction of other Federal laws by ERISA.

The savings clause of ERISA prevents the preemption of the California prevailing wage statute at issue as well as all such similar statutes. If states are not able to enact and enforce their own prevailing wage laws that encourage and promote minimum apprenticeship standards adopted by the states, the fundamental

purpose of the Fitzgerald Act will be severely limited. The Fitzgerald Act is not an exclusive Federal concern. The vitality of the Act depends on state involvement and state participation in apprenticeship regulation. Therefore, the Ninth Circuit's conclusion that Federal law is not impaired to the extent that ERISA preempts the enforcement of the California prevailing wage law is erroneous and cannot be sustained.

ARGUMENT

THE CALIFORNIA PREVAILING WAGE LAW AT ISSUE IS NECESSARY TO FITZGERALD ACT APPRENTICESHIP REGULATION AND IS, THEREFORE, SAVED FROM ERISA PREEMPTION UNDER SECTION 514(d).

ERISA, 29 U.S.C. § 1001 *et seq.*, is a comprehensive statute regulating the provision of benefits by employers to employees. It was the intention of Congress to create uniformity of law with respect to employee benefit plans. Consequently, Section 514 of ERISA preempts all state laws "relating to" employee benefit plans. ERISA § 514, 29 U.S.C. § 1144. Certain conditions, however, were imposed on the preemption provisions of Section 514. Subsection (d) of Section 514 provides that "nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514 (d), 29 U.S.C. § 1144(d). Thus, the broad sweep of ERISA was not meant to diminish other Federal laws.

Preemption of laws such as the California prevailing wage law at issue would result in just such an impairment. Preemption impairs the cooperative state jurisdiction over apprenticeship programs envisioned by the Fitzgerald Act. *See Minn. Chapter of Assoc. Builders & Contractors v. Minn. Dept. of Labor & Indus.*, 47 F.3d 975, 980, *reh'g en banc denied*, 1995 U.S. App. LEXIS 7588 (8th Cir. 1995). The Fitzgerald Act, 29 U.S.C. § 50, which was adopted by Congress in 1937, provides, in relevant part:

> [t]he Secretary of Labor is authorized and directed *to* ***formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices***, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, ***to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship*** . . .

29 U.S.C. § 50 [emphasis added].

States are an important participant in the Fitzgerald Act process beyond that evident by the language of the Act itself. They are key players in the regulatory scheme promulgated by the Department of Labor. These regulations set forth minimum standards for apprenticeship programs as a prerequisite for approval "for various Federal purposes"[1] by either the Bureau of Apprenticeship Training ("BAT") *or* a state apprenticeship agency recognized by BAT. *See* 29 C.F.R. § 29.5 (1995). The state apprenticeship agency providing such approval must also meet certain standards in order to be recognized by BAT and be

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[1] The regulations define "Federal purposes" as including any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship. 29 C.F.R. § 29.2 (k).

able to approve an apprenticeship program. *See* 29 C.F.R. § 29.12 (1995).

The active -- and integral -- role of approval and regulation expected of the states under the Fitzgerald Act is also borne out by its history. In a joint letter to the Subcommittee on Appropriations for the Department of Labor, dated March 1, 1937, in support of the bill adopting the Fitzgerald Act, the Department of Labor and Office of Education stated:

> It has been amply demonstrated that the responsibilities in connection with the apprentice as an employed worker ***can best be carried on by the State labor department*** which is charged with the general responsibility of improving working conditions and fostering the well-being of the workers, and that the responsibilities in connection with the apprentice as a student ***can best be performed by the State board for vocational education***. These State agencies in turn look to the United States Department of Labor and to the United States Office of Education for leadership and research and for the determination of national standards in their respective fields.

H. R. Rep. No. 945, 75th Cong. 1st Sess., at 5-6 (1937) [emphasis added]. Therefore, before and at the inception of the Act, it was recognized by the Federal agencies responsible for implementing the Act that the enforcement scheme necessary for adequate regulation of apprenticeship programs was a *joint* program involving participation by the states.

The Ninth Circuit's holding that Section 514 (d) of ERISA does not save the California prevailing wage law from preemption is based upon an overly narrow reading of both the Savings Clause and the Fitzgerald Act. This reading is predicated on the conclusion that the Fitzgerald Act does not depend upon states to enforce its provisions and "in fact, there is nothing in the [Fitzgerald Act] for the states to enforce." *Dillingham Const. N.A. Inc. v. County of Sonoma*, 57 F.3d 712, 721 (9th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 1416 (1996), (*quoting National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555, 1562 (10th Cir.), *cert. denied*, 506 U.S. 753, 113 S. Ct. 406, 121 L.Ed 331 (1992)). However, it is erroneous to conclude that an act such as the Fitzgerald Act can only be impaired for purposes of the Savings Clause by interference with state enforcement of a Federal law. [2]

The state role anticipated by the Fitzgerald Act -- and, ultimately, the creation of minimum standards for the welfare of apprentices -- cannot be achieved if laws such as the California

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[2] The Ninth Circuit relies on this Court's opinion in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98, 103 S. Ct. 2890, 2900-01, 77 L.Ed.2d 490 (1983), for the proposition that, even if application of the California statute in issue furthers the objectives of the Fitzgerald Act, it is not an enforcement mechanism of Federal law, and to the extent that its enforcement is preempted, Federal law is not impaired. *Dillingham*, 57 F.3d at 721. However, the plain language of Section 514(d) prohibits ERISA impairment of *any* Federal law and, on its face, cannot be said to allow preemption of a state law that is intricately entwined and serves the purpose of a Federal law without explicitly enforcing the Federal law.

prevailing wage law at issue are preempted by ERISA. Under the Ninth Circuit view, as a practical matter, states would be limited to their role under the Department of Labor regulations, i.e., approving and enforcing apprenticeship standards on Federal projects and registering apprenticeship programs for this purpose. Federal projects, however, are not the universe of projects employing apprentices. Laws such as the California prevailing wage law at issue allow states to promote and mandate the minimum apprenticeship standards fostered by the Fitzgerald Act through the most effective means possible -- permission to pay a lower wage for apprentices enrolled in approved programs which provide adequate supervision, legitimate standardized curriculums, and minimum safety standards. This extends minimum apprenticeship standards beyond the Federal domain -- a result surely anticipated by the Fitzgerald Act.

The impairment of the Fitzgerald Act through preemption of the state role in apprenticeship regulation is evident by examining the consequences of limiting the state role in apprenticeship regulation and negating laws such as Section 1777.5 of the California Labor Code. Apprenticeship training is not an endeavor that can be implemented in a disorganized or haphazard manner. Approved programs require certain training ratios between apprentices and supervisors which assure that apprentices receive necessary supervision. Legitimate standardized curriculums used by such programs provide apprentices with the knowledge base to perform quality work. Without the ability to encourage participation in approved programs -- i.e., programs meeting minimum standards -- by allowing a lower wage for apprentices, many contractors will choose the option of utilizing apprentices on state projects from unapproved programs. These programs will undoubtedly not have sufficient training standards -- including necessary safety

training -- and sufficient ratios of journeymen to apprentices that provide apprentices with adequate supervision. They also will not provide the education that is an integral part of apprenticeship. Without appropriate state regulation, apprenticeship programs may be set up on an *ad hoc* basis for the single project solely to take advantage of the lower wage. In order to compete, legitimate contractors would feel economically pressured to follow the same route -- i.e., abandon existing approved apprenticeship programs diminishing the overall quality of apprenticeship training as these approved programs suffer economic decline.

This scenario will take place if the Ninth Circuit's holding is allowed to stand. The Fitzgerald Act, which contemplates a Federal-state partnership, would be crippled. ERISA itself does not fill the void, as it does *not* regulate the context or substance of apprenticeship programs -- it only contains certain fiduciary and reporting requirements. *See generally*, ERISA §§ 101-414, 29 U.S.C. §§ 1001-1114. A key component of Federal Davis-Bacon projects[3] would remain a lower wage for apprentices as long as apprentices are enrolled in an approved apprenticeship program. However, state regulation of apprenticeship standards as contemplated by the Fitzgerald Act will cease to exist. A contractor will be able to self-designate apprentices. The only alternative to this "system" would be the decision by states requiring that all workers be paid as journeymen on state projects, which would effectively prohibit the use of apprentices. This, of course, would make no sense since it would limit job opportunities, increase the cost of construction and eliminate the incentive for quality training.

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[3] *See* 40 U.S.C. § 276a; 29 C.F.R. § 5.5(a)(4).

Because either scenario would undermine the purposes and policies underlying the Fitzgerald Act, which mandates a Federal-state partnership that utilizes approved apprenticeship, the ERISA savings clause *must* operate to prevent preemption of such state regulations.

CONCLUSION

For the foregoing reasons, NECA respectfully submits that the decision of the Court below preempting California Labor Code § 1777.5 was erroneous and must be reversed.

Respectfully submitted,

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